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**IN THE
COURT OF APPEALS OF INDIANA**

ERNEST R. SNOW,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 03A04-0007-CR-294
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-9810-CF-1051

July 17, 2001

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROOK, Judge

Case Summary

Appellant-defendant Ernest R. Snow (“Snow”) appeals his conviction for carrying a handgun without a license¹ as a Class C felony. We affirm.

Issue

Snow claims that the handgun should have been suppressed as the product of an illegal search and seizure. However, we find one issue to be dispositive: whether the trial court’s admission of the handgun constituted reversible error where Snow failed to object to testimony of the same probative value.

Facts and Procedural History²

The relevant facts most favorable to the conviction indicate that at approximately 11:30 p.m. on April 6, 1998, Officer Alan Hayes (“Hayes”) of the Columbus Police Department received a dispatch regarding a “suspicious” green Lincoln or Cadillac with two black males inside parked on a street behind a pool hall. Hayes drove toward the front of the vehicle as Officer Paula Rothrock (“Rothrock”) approached the rear of the vehicle. As Hayes rolled to a stop, he saw the Lincoln’s driver’s side door open slightly and close. Hayes exited his car and walked toward the Lincoln. Rothrock activated her car’s emergency lights and prepared to approach the Lincoln. As she exited her car, a person exited the passenger side of the Lincoln and ran from the scene with his hand in his right coat pocket. Rothrock pursued the fleeing person on foot.

¹ See IND. CODE § 35-47-2-1.

As Hayes continued to approach the Lincoln, Snow began to step out of the car. Hayes ordered Snow back in the vehicle and asked him to keep his hands where they could be seen. Hayes asked Snow if he had any weapons, and Snow stated that he did not. Hayes then asked Snow for identification. Snow complied with this request, but Hayes did not immediately check the identification because he did not want to take his attention away from Snow. Hayes noticed that Snow seemed very nervous. Snow twice asked Hayes if he could relax. Hayes replied, “[W]ell, we’re just going to han[g] tight for a second.” When Hayes asked Snow why he was in the area, Snow responded that a friend of his had told him that the pool hall was a good place to play pool.

Unable to apprehend the fleeing passenger, Rothrock returned to the Lincoln. Hayes asked Snow to get out of the Lincoln and place his hands on top of the car. Instead, Snow exited the Lincoln and walked toward the rear of the vehicle. Hayes then asked Snow to place his hands on top of his head, and Snow complied. Hayes placed his left hand on top of Snow’s head and began to pat down his clothing for weapons. When Hayes reached Snow’s right front coat pocket, he felt a large hard object that he immediately recognized as a gun. Hayes reached into the pocket, pulled out a handgun, and handed it to Rothrock. Hayes asked Snow if he had a license to carry the handgun, and Snow replied that he did not. At some point during this investigation, Hayes checked Snow’s identification and license plate and found no outstanding warrants or traffic violations.

² We heard oral argument in this case on May 15, 2001, at Logansport High School in Logansport, Indiana. We extend our appreciation to the faculty, staff, and students of Logansport High School for hosting the argument and to the Honorable Julian L. Ridlen and the Cass County Bar Association for their enthusiastic interest and involvement.

On October 19, 1998, the State charged Snow with carrying a handgun without a license as a Class D felony, later amended to a Class C felony due to a previous felony conviction. At trial, Hayes testified that he had found a handgun in Snow's coat pocket and that Snow had stated he did not have a license for the gun, but Snow did not object until the State offered the handgun into evidence. The trial court admitted the handgun into evidence over Snow's objection, and the jury found Snow guilty as charged on February 8, 2000.

Discussion and Decision

"The admissibility of evidence is within the sound discretion of the trial court. We will not disturb its decision absent a showing that the trial court abused its discretion." *Johnson v. State*, 710 N.E.2d 925, 927 (Ind. Ct. App. 1999) (citation omitted). Snow argues that the handgun should have been suppressed as the product of an illegal search and seizure. The State points out that Snow failed to object when Hayes testified that Snow possessed a handgun and had no license to carry it. Even if the trial court abused its discretion in admitting the handgun, "erroneous admission of evidence is not reversible error when evidence of the same probative value was admitted without objection." *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000). The admission of Snow's handgun was merely cumulative of Hayes' testimony that Snow possessed it. Accordingly, we find no reversible error.

Affirmed.

KIRSCH, J., concurs.

ROBB, J., concurs in result, with opinion.

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ROBB, Judge, concurring in result.

I respectfully concur in result. The majority disposes of this case on the basis of waiver. I, however, do not believe that Snow waived his allegation of error because he objected when the handgun was offered into evidence.

Indiana Evidence Rule 103(a) states that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context” In this case, when the State moved to admit the handgun into evidence, Snow objected “on the basis that there was . . . no foundation for Officer Hayes patting down Mr. Snow.” R. 204. The parties and the court then engaged in a sidebar discussion regarding Snow’s objection, at the conclusion of which the trial court overruled Snow’s objection and admitted the handgun. The majority holds that Snow waived his claim by failing to object to testimony of similar probative value.

However, the question presented to us is whether or not the gun itself should have been admitted into evidence. It appears to me that Snow objected properly to the admission of the gun. Until the gun was offered into evidence there was nothing to which Snow could object. I, therefore, would look at the merits of Snow's claim, that the search which uncovered the gun was unlawful and therefore, that the gun should have been excluded from evidence.

I. Admission of the Gun

In this case, Snow did not file a pre-trial motion to suppress the gun. Therefore, we are reviewing only the trial court's decision to admit the gun at trial over Snow's objection. As the majority stated, a trial court has broad discretion in ruling on the admissibility of evidence, and on review we will disturb a trial court's ruling only upon a showing of an abuse of discretion. Sparkman v. State, 722 N.E.2d 1259, 1262 (Ind. Ct. App. 2000).

The United States Supreme Court established in Terry v. Ohio, 392 U.S. 1 (1968), the rule that a police officer can briefly detain a person for investigatory purposes even without probable cause, if the officer has a reasonable suspicion of criminal activity based on specific and articulable facts. The requirement of reasonable suspicion is satisfied when the facts known to the officer, together with the reasonable inferences arising therefrom, would permit an ordinary prudent person to believe that criminal activity has or was about to occur. Taylor v. State, 639 N.E.2d 1052, 1054 (Ind. Ct. App. 1994). "Such reasonable suspicion must be comprised of more than an officer's general 'hunches' or unparticularized suspicions." Webb v. State, 714 N.E.2d 787, 788 (Ind. Ct. App. 1999) (citing Terry, 392 U.S. at 27). Whether an investigatory stop is justified is determined on a case by case basis. Kenworthy v. State, 738 N.E.2d 329, 331 (Ind. Ct. App. 2000). In making this determination, we

consider the totality of the circumstances. Stalling v. State, 713 N.E.2d 922, 925 (Ind.Ct.App.1999).

Hayes testified that he received a dispatch which merely reported a “suspicious vehicle” parked behind a pool hall with two black males inside. No further information regarding what made the vehicle or its occupants “suspicious” was given. Hayes testified that he believed Snow might be armed because Snow seemed nervous during their encounter and because he believed that the passenger who had run away from the scene might be armed.

I do not believe that this rises to the level of “reasonable suspicion.” First, Hayes had no specific information about the vehicle other than a general description of it as “suspicious.” He was given no information about who had reported the vehicle. When Hayes arrived on the scene, he did not observe any traffic infractions, parking offenses, or suspicious activity within the car, but he immediately approached the vehicle. I do not believe he had any cause to approach the vehicle in the first place. However, even if Hayes’ initial encounter with Snow was justified under Terry, I do not believe that the balance of the encounter was so justified. The mere fact that Snow appeared nervous during the encounter was insufficient to give Hayes reasonable suspicion that criminal activity might be afoot. A vague and general characterization of demeanor, such as “nervousness,” does not rise to the level of reasonable suspicion. Cannon v. State, 722 N.E.2d 881, 884 (Ind. Ct. App. 2000). The fact that Snow’s passenger fled from the scene weighs slightly in Hayes’ favor; however, in Wilson v. State, our supreme court noted that police may not conduct a pat-down search for weapons “on less than reasonable belief or suspicion directed at the person to be

frisked.” 745 N.E.2d 789, 792 (Ind. 2001) (quoting Ybarra v. Illinois, 444 U.S. 85, 94 (1979)) (emphasis added). The only thing Hayes could point to about Snow’s specific conduct was that he appeared nervous. Snow complied with all of Hayes’ requests, to remain in the vehicle, to put his hands where Hayes could see them, to show identification, and ultimately to exit the vehicle.

Therefore, because I do not believe that the search was properly supported by reasonable suspicion, I would hold that the trial court abused its discretion in overruling Snow’s objection and admitting the gun into evidence.

II. Foundational Questions

When the admission of a particular piece of evidence is denied, I believe that the foundational questions which preceded the offer of the exhibit should be stricken, as well, even without a separate objection to those questions at the time they are asked. In fact, an objection to a “foundational question” would most likely be an exercise in futility, as the State would respond that the question was foundational in nature and the trial court would allow the question. However, unlike preliminary questions, which are clearly identified as such, foundational questions are not so easily discerned. Without an objection, at which time the State clearly states on the record that the question is foundational, determining which questions are foundational in nature is not an easy task, and if it is at all unclear whether a particular question is foundational in nature, we would be constrained to weigh the absence of an objection in favor of the proponent of the question. Therefore, it may be incumbent upon the defendant to either make an objection to each question which the defendant believes to be foundational or to make an objection at the outset of what he believes to be the

foundational questions for a particular exhibit to which he wishes to object in order to preserve any error.

In this particular case, Hayes gave a great deal of testimony regarding his encounter with Snow. Hayes testified that when he conducted a pat-down search of Snow, he found a “large hard object” in Snow’s right front coat pocket and recognized by feel that the object was some kind of gun. He then retrieved the weapon from Snow’s pocket. All of this testimony was given without an objection by Snow. Hayes was then shown State’s Exhibit One and identified the exhibit as the firearm that he recovered from Snow.

Because so much testimony regarding the gun preceded the actual introduction of the gun into evidence, and because it is not clear whether these questions are purely foundational in nature or also substantive, I agree that the introduction of the gun itself would be merely cumulative, and therefore, there was the error in admitting the gun was harmless. Therefore, although I believe that the gun should have been suppressed as the product of an illegal search, I agree with the majority that Snow’s conviction must nevertheless be affirmed because of the testimony which preceded the offer of the handgun into evidence.

I therefore concur in result.